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ORIGINAL

NOV 26 2003

November 26, 2003

VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

Dear Secretary Williams:

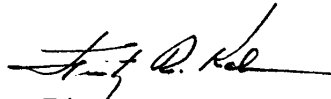
Enclosed for filing in STB Finance Docket No. 34415, Ohio Department of Transportation-Petition for Declaratory Order-Status of Track at Findlay, Hancock County, OH, are the original and ten copies of the Petition and appended Reply of the Ohio Department of Transportation.

Additional copies of this letter and of the Petition and appended Reply are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the messenger.

Service of the Petition and appended Reply upon Norfolk Southern Railway Company has been effected by facsimile transmitting copies to its counsel.

If you have any question concerning the foregoing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,



Fritz R. Kahn

enc.

cc: Roger L. Miller, Esq.
James R. Paschall, Esq.
Michael L. Stokes, Esq.

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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 34415

OHIO DEPARTMENT OF TRANSPORTATION
– PETITION FOR DECLARATORY ORDER –
STATUS OF TRACK AT FINDLAY, HANCOCK COUNTY, OH

PETITION
OF
OHIO DEPARTMENT OF TRANSPORTATION

Michael L. Stokes
Senior Assistant Attorney General
Office of the Attorney General
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ENTERED
Office of Proceedings

NOV 26 2003

Part of
Public Record

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Special Counsel to the
Attorney General of Ohio

Attorneys for

OHIO DEPARTMENT OF TRANSPORTATION

Dated: November 26, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

NOV 26 2003

STB Finance Docket No. 34415

OHIO DEPARTMENT OF TRANSPORTATION
-PETITION FOR DECLARATORY ORDER-
STATUS OF TRACK AT FINDLAY, HANCOCK COUNTY, OH

PETITION
OF
OHIO DEPARTMENT OF TRANSPORTATION

Petitioner, Ohio Department of Transportation ("ODOT"), pursuant to 49 C.F.R. 1117.1, seeks leave to file a reply to the Response of Norfolk Southern Railway Company ("NS"), filed November 6, 2003, to the Petition for Declaratory Order Filed by Ohio Department of Transportation, and in support thereof ODOT states, as follows:

1. ODOT understands full well that under the Board's regulation, 49 C.F.R. 1104.13 (c), a reply to a reply ordinarily is not allowed.
2. The Board, however, will construe its rules liberally and allow the filing of a reply to a reply when its receipt will contribute to a complete record without prejudicing any party and delaying the proceeding. STB Finance Docket No. 34048, Reading Blue Mountain and Northern Railroad Company-Lease and Operation Exemption-Norfolk Southern Railway Company and Pennsylvania Lines LLC, served August 1, 2001; STB Finance Docket No. 32964, Brotherhood

of Mainenance of Way Employees, et al. v. Soo Line Railroad Company and Wisconsin Central Ltd., served December 22, 1998 STB Finance Docket No. 33323, Chicago Rail Link, L.L.C.-Lease and Operation Exemption-Union Pacific Railroad Company, served September 2, 1997; Finance Docket No. 32158, Gateway Western Ry. Co.-Construction Exemption-St. Claire County, IL, served May 4, 1993.

3. NS in its Response misrepresents the holdings of certain of the Board's and courts' decisions upon which it relies and distorts completely the position which ODOT has taken in this proceeding.

4. Allowing ODOT to file the attached brief Reply will permit the Board to have a complete and accurate record upon which to render its decision in response to ODOT's Petition for Declaratory Order, in no way will prejudice NS and certainly will not delay the proceeding.

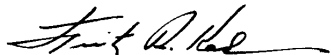
WHEREFORE, Petitioner, Ohio Department of Transportation, aks that the Board receive its Reply to NS' Response.

Respectfully submitted,

OHIO DEPARTMENT OF TRANSPORTATION

By its attorneys,

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Special Counsel to the
Attorney General of Ohio

Dated: November 26, 2003

CERTIFICATE OF SERVICE

I certify that I this day have served the foregoing Petition upon Norfolk Southern Railway Company by facsimile transmitting copies thereof to its counsel, roger L. Miller, Esq., and James R. Paschall, Esq.

Dated at Washington, DC, this 26th day of November 2003.



Fritz R. Kahn

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 34415

OHIO DEPARTMENT OF TRANSPORTATION
– PETITION FOR DECLARATORY ORDER –
STATUS OF TRACK AT FINDLAY, HANCOCK COUNTY, OH

REPLY
OF
OHIO DEPARTMENT OF TRANSPORTATION

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Special Counsel to the
Attorney General of Ohio

Attorneys for

OHIO DEPARTMENT OF TRANSPORTATION

Dated: November 26, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 34415

OHIO DEPARTMENT OF TRANSPORTATION
– PETITION FOR DECLARATORY ORDER –
STATUS OF TRACK AT FINDLAY, HANCOCK COUNTY, OH

REPLY
OF
OHIO DEPARTMENT OF TRANSPORTATION

Petitioner, Ohio Department of Transportation ("ODOT"), pursuant to leave granted by the Board, replies in opposition to the Response of Norfolk Southern Railway Company ("NS"), filed November 6, 2003, to Petition for Declaratory Order Filed by Ohio Department of Transportation and states, as follows:

1. ODOT is aware that the Board long has enjoyed the exclusive and plenary authority to authorize the abandonment of railroad lines. Chicago & N.W. Tr. Co. v. Kalo Brick & Tile, 450 U.S. 311, 320-21 (1981); New Orleans Terminal Company v. Spencer, 366 F.2d 160, 166 (5th Cir. 1966), cert. den., 386 U.S. 942 (1967) City of Des Moines v. Chicago & N.W. Ry. Co., 264 F.2d 454, 457 (8th Cir. 1959). The jurisdiction of the Board alone to determine whether a railroad line should be abandoned has been reinforced by the sweeping preemption provision of 49 U.S.C. 10501(b). "It is difficult to imagine a broader statement of Congress's intent to preempt state

regulatory authority over railroad operations." CSX Transp., Inc. v. Georgia Public Serv. Com'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Accord, Wisconsin Central v. City of Marshfield, 160 F. Supp.2d 1009, 1013 (W.D. Wisc. 2000); Burlington Northern Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1293 (D. Mont. 1997); STB Docket No. AB-433X, Idaho Northern & Pacific Railroad Company—Abandonment Exemption—In Wallowa and Union Counties, OR, served December 13, 2001; STB Finance Docket No. 34090, Union Pacific Railroad Company—Petition for Declaratory Order, served November 9, 2001; STB Finance Docket No. 33971, Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, served May 1, 2001, aff'd, Boston and Maine Corp. v. Town of Ayer, 191 F. Supp.2d 257 (D. Mass. 2002); Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna and Western Railway Corporation, served September 10, 1999. ODOT does not contend otherwise, and nothing in its Petition for Declaratory Order is to the contrary.

2. ODOT understands that neither Ohio or any other state nor the Board can authorize the abandonment of a spur. ODOT appreciates the preemptive breadth of the statute and has instituted no adverse abandonment proceeding forcing NS' abandonment of the Findlay spur, either before the Board or any other body. 49 U.S.C. 10501(b)(2) vests the Board with exclusive jurisdiction over spur abandonments, Railroad Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523 (6th Cir. 2002), affirming, STB Docket No. AB-556 (Sub-No. 2X), Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbus Counties, OH, and Beaver County, PA, served October 4 and November 2, 2000, even as 49 U.S.C. 10906 declares that no approval of the Board is required for a spur abandonment. Illinois Commerce Com'n v. I.C.C., 879 F.2d 917 (D.C. Cir. 1989), reversing,

CNW—Abandonment Exemp.—In McHenry County, IL, 3 I.C.C.2d 366 (1987); Nicholson v. I.C.C., 711 F.2d 364 (D.C. Cir. 1983), cert. den., 464 U.S. 1056 (1984), affirming, Nicholson v. Missouri Pacific Railroad Company, 366 I.C.C. 69 (1982). As NS correctly concludes, at page 17 of its Response, "[T]he abandonment of excepted tracks is a matter that Congress has left to the managerial discretion of the railroads." Again, ODOT does not contend otherwise, and nothing in its Petition for Declaratory Order is to the contrary.

3. At pages 16-17 of its Response, however, NS maintains not only that it solely can decide to abandon a spur but also that it alone can determine whether it in fact has abandoned the spur. Whether NS has abandoned the Findlay spur, in the view of NS, is a wholly subjective determination for it to make. Extrinsic evidence of the spur's actual abandonment by NS is completely irrelevant.

4. In its Response, NS does not dispute that the Findlay spur has not been used by NS to serve the sugar plant erected by Great Lakes Sugar Company in at least 12 to 15 years' time, as was noted in the Verified Statement of Daniel M. Kaseman, ODOT's Production Administrator for District One, attached to ODOT's Petition for Declaratory Order. NS does not take issue with the fact that the 807 feet of track which are in issue are in shambles, that lengths of rail have been removed and that most of the ties have rotted to the point that Mr. Kaseman was able to pull out their spikes by hand.

5. NS argues that the long disuse and complete disrepair of the disputed 807 feet of the Findlay spur are not indicia of NS' actual abandonment of the track. At page 6 of its Response, NS contends that "relevant legal precedent does not support ODOT's argument that the track segment at issue has been, or even legally can be, subject to *de facto* abandonment." NS cites to

STB Docket No. AB-33 (Sub-No. 132X), Union Pacific Railroad Company–Abandonment Exemption–In Rio Grande and Mineral Counties, CO, served May 24, 2000, and STB Docket No. AB 547X, Roaring Fork Railroad Holding Authority–Abandonment Exemption–In Garfield, Eagle, and Pitkin Counties, CO, served May 21, 1999. The Board's decisions relied upon by NS, however, did not involve exempted track. The decisions are in accord with other Board decisions, cited at page 10 of ODOT's Petition for Declaratory Order, STB Finance Docket No. 33508, Missouri Central Railroad Company–Acquisition and Operation Exemption–Lines of Union Pacific Railroad Company, served April 30, 1998, and Finance Docket No. 32518, The Phillips Company – Petition for Declaratory Order, served April 18, 1995, aff'd sub nom., Phillips Co. v. Southern Pac. Rail Corp., 902 F. Supp. 1310 (D. Colo. 1995), aff'd sub nom., Phillips Co. v. Denver and Rio Grande Western R.R. Co., 97 F.3d 1375 (10th Cir. 1996), in which the Board held that track is not abandoned until the Board has authorized its abandonment and the abandonment has been consummated. The tracks under consideration in each one of these proceedings, however, were of railroad lines, the abandonment of which could be authorized by the Board, and not spur tracks, which the Board is without the power to approve or disapprove for abandonment. Contrary to NS' contention, at page 15 of its Response, the legal principles or precedents minimizing the significance of disuse and disrepair of the property in line abandonment proceedings do not foreclose determinations of *de facto* abandonments of excepted track. Nothing in the cited decisions suggests that the Board may not itself find, or, alternatively, leave to the Court of Common Pleas of Hancock County to find, that NS in fact has abandoned the Findlay spur.

6. Indeed, at pages 7 and 8 of its Response, NS notes that the Board has asserted

jurisdiction over spur tracks notwithstanding that it is without power to authorize their abandonment, citing to STB Finance Docket No. 33740, The Burlington Northern and Santa Fe Railway Company – Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, served May 13, 2003, and Cities of Auburn and Kent, WA–Petition for Declaratory Order–Burlington Northern Railroad Company–Stampede Pass Line, 2 S.T.B. 330 (1997), aff'd sub nom., City of Auburn v. S.T.B., 154 F.3d 1025 (9th Cir. 1988), cert. den., 527 U.S. 1022 (1999). When it suited its convenience, however, NS chose to ignore the Board's jurisdiction, as it did when it sold the first 2,800 feet of the Findlay spur to 84 Lumber.

7. At pages 12 to 14 of its Response, NS attempts to ridicule ODOT's claim that NS' sale to 84 Lumber of the first 2,800 feet of the Findlay spur, thereby cutting off access to the remaining 807 feet of the spur, was yet another indicium that NS in fact had abandoned the Findlay spur. NS hints – but never expressly states – that it retained the right to operate over the track sold to 84 Lumber to serve any shipper located beyond the conveyed segment. NS, however, attached no verified statement, deed or other evidence attesting to NS' reservation of an easement through the 84 Lumber property. At page 13, NS says, "Sale of the underlying real estate, and even the track material, does not automatically result in the right to operate over the track being either abandoned or restricted, since the operating rights may be separated from the ownership of the real estate and track material." NS cites to Finance Docket No. 33838, Metro Regional Transit Authority–Acquisition Exemption–CSX Transportation, Inc., served October 10, 2003; STB Finance Docket No. 34258, North Carolina State Ports Authority–Acquisition Exemption–North Carolina Ports Railway Commission, served October 31, 2002; and Maine, DOT–Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835 (1991). In each of the cited

proceedings, however, the Board or ICC was provided with a copy of the agreement between the railroad and the purchaser and afforded the opportunity to satisfy itself that the sale of the real estate and track material did not impair the ability of the railroad to continue to render service over the conveyed property. In the Maine decision, 8 I.C.C. at 837-38, the ICC specifically stated, "We caution that any similar transactions should . . . be submitted to us in advance, together with a copy of the agreement between the railroad and the entity acquiring the right-of-way, for a jurisdictional determination." Of course, NS and 84 Lumber did not furnish the Board with a copy of the agreement whereby 84 Lumber acquired the first 2,800 feet of the Findlay spur, and, hence, the Board has no way of knowing whether NS is able to operate over the track it sold to 84 Lumber. In other words, while going to great lengths to argue that the Board retains jurisdiction over spurs, even though the agency cannot authorize their abandonment, NS elected to ignore the Board when it sold the 2,800-foot segment of the Findlay spur to 84 Lumber.

8. ODOT does not doubt that the 84 Lumber directional sign which now straddles the track could be removed, the paved entrance to 84 Lumber over the track could be replaced with a crossing and the remainder of the Findlay spur could be rebuilt to render it operable, as NS maintains at page 14 of its Response. The fact remains, however, that none of these remedial steps have been taken by NS, and that these impediments to operations on the disputed 807 feet of the Findlay spur presently exist are yet additional indicia that NS in fact has abandoned the Findlay spur. The current owner of the plant, Michigan Sugar Company, could not obtain service from NS, even if it were disposed to request such service, and the Company could not complain to the Board for NS' failure to render service on what NS, contrary to all objective criteria, insists is an unabandoned spur. Finance Docket No. 32058, Battaglia Distributing Co., Inc. v.

Burlington Northern Railroad Company, served December 11, 1998; No. 41068, Valley Feed Company v. Greater Shenandoah Valley Development Company d/b/a Shenandoah Valley Railroad Company, served December 11, 1998.

9. The notion that only NS can decide whether it has abandoned the Findlay spur, as it contends at page 16-17 of its Response, is repugnant to good sense and reasonable regulation. Carried to its logical conclusion, it would mean that, no matter how long disused and how inoperable its deplorable state has rendered it, a spur never could be found to have been abandoned and, hence, be condemned for public use so long as the railroad claims not have abandoned it. Any highway project affecting a long abandoned spur could be halted by the mere assertion by the railroad that the spur has not been abandoned, no matter what its motives might be.

10. If NS were unwilling to face up to fact it has not used the Findlay spur to serve the former Great Lakes Sugar Company plant in more than 12 to 15 years' time, that it has sold the first 2,800 feet of the Findlay spur to 84 Lumber, thereby rendering it impossible for NS to reach the remainder of the spur, and that it has allowed the unsold track to become totally inoperable are indicia of NS' actual abandonment of the Findlay spur, the Board should not shy away from making a finding that NS in fact has abandoned the Findlay spur or, in the alternative, from allowing the Court of Common Pleas of Hancock County to come to that conclusion.

11. Although at page 16 of its Response, NS disclaims that it is attempting to use the Board's process to shield itself from the application of state law, that is precisely what it is doing. NS managed to bring the proceedings before the Court of Common Pleas of Hancock County to a halt, at least for six months' time, by alleging that ODOT's action to quiet title to the right-of-way

of U.S. Highway 68/State Route 15 by-pass bridge interfered with rail transportation and was preempted by the laws administered by the Board. Such misuse of the Board's procedures should not be countenanced by the agency. STB Docket No. AB-596, New York City Economic Development Corporation--Adverse Abandonment--New York Cross Harbor Railroad in Brooklyn, NY, served May 12, 2003; STB Docket No. AB-31 (Sub-No. 38), CSX Corp. And CSX Transportation, Inc.--Adverse Abandonment Application--Canadian National Railway Company and Grand Trunk Western Railroad Inc., served February 1, 2002; STB Docket No. AB-290 (Sub-No. 184X), Norfolk and Western Railway Company--Abandonment Exemption--In Cincinnati, Hamilton County, OH, served May 13, 1998; Modern Handcraft, Inc.--Abandonment, 363 I.C.C. 969, 972 (1981).

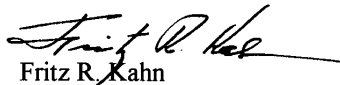
WHEREFORE, the Ohio Department of Transportation asks the Board to render a declaratory order finding that the disposition of the track which would be affected by the proposed lowering of the U.S. Highway 68/State Route 15 Findlay by-pass bridge is not within the agency's jurisdiction and that the case before the Court of Common Pleas of Hancock County is not preempted by 49 U.S.C. 10501(b). A copy of the agency's decision should be sent to Judge Joseph H. Niemeyer.

Respectfully submitted,

OHIO DEPARTMENT OF TRANSPORTATION

By its attorneys,

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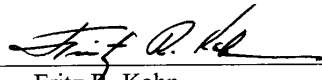
Special Counsel to the
Attorney General of Ohio

Dated: November 26, 2003

CERTIFICATE OF SERVICE

I certify that I this day have served the foregoing Reply upon Norfolk Southern Railway Company by facsimile transmitting copies thereof to its counsel, Roger L. Miller, Esq., and James R. Paschall, Esq.

Dated at Washington, DC, this 26th day of November 2003.



Fritz R. Kahn